THE CORPORATION JOURNAL

(REGISTERED U. S. PAT. OFFICE)

VOL. X, No. 11 NOVEMBER, 1932 PAGES 241-264

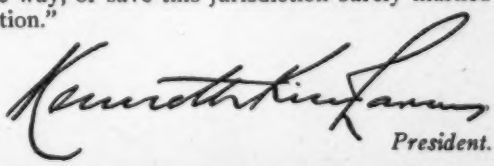
COMPLETE NUMBER 204

Published by
THE CORPORATION TRUST COMPANY AND AFFILIATED COMPANIES

The policy of The Corporation Trust Company in all matters relating to the incorporation, qualification, statutory representation, and maintenance of corporations, is to deal with members of the bar, exclusively.

Diversity of Citizenship and Jurisdiction of Federal Courts

Lawyers are familiar with "the pending Norris Bill" (U. S. Senate 939). United States District Judge Bourquin has a word to say about it (59 F. (2d) 220). "If the scheme be furthered by the cooperation of, say, an amiable court, what is it but employment of the judicial club to beat off and hold up creditors until, wearied, they settle with or wait the pleasure of the debtor's executive vice-president receiver shielded by the judicial gown? That the like is not uncommon is unfortunately true, is a scandal to courts of equity, undermines vital confidence in their impartiality, lessens essential respect due them in so far as their administration merits it and not at all to their antiquated silken gown, impairs necessary prestige and real usefulness, and is of the abuses which incite congressional limitation of the jurisdiction of Federal courts until soon they will be little more than police courts, incite amongst others the pending Norris Bill, which, enacted as in due course it will be, will end all that jurisdiction based on diverse citizenship as are the instant proceedings and receiverships in general. * * * Slight is the probability, however, that any protest or voice crying in the wilderness will inspire repentance, make straight the way, or save this jurisdiction surely marked for destruction."



President.

THE CORPORATION JOURNAL

VOL. X, No. 11 NOVEMBER, 1932 PAGES 241-264

The Corporation Journal is published by The Corporation Trust Company monthly, except in July, August, and September. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices (see next page).

When it is desired to preserve the Journal in a permanent file, a special and very convenient form of binder will be furnished at cost ($1.50).

Contents for November

Page

Foreign Corporations and Federal Contract Work ...245

Digests of Court Decisions

Domestic Corporations 246

Foreign Corporations 256

Taxation 260

Corporate Meetings Held 261

Some Important Matters for November and December..261

Foreign Corporations and Federal Contract Work

A question concerning which some doubt exists, is whether a foreign corporation about to engage in work under a contract with the Federal government, such as the construction of a post-office, etc., is required to qualify as a foreign corporation in the state wherein such work is to be done. Leading counsel in considering the matter, are not at all in accord, and have arrived at directly opposite conclusions.

It is, of course, too well settled for discussion, that a state cannot directly tax Federal property, or the instrumentalities through which the Government functions. Likewise, a state cannot interfere with the Federal Government in the exercise of its powers under the Constitution. But is a private corporation operating under a Federal contract, such an instrumentality as to be free from interference?

The cases of *Panhandle Oil Co. v. Mississippi ex rel. Knox,* (277 U. S. 218), and *Western Union Telegraph Co. v. Texas,* (105 U. S. 460), have been frequently cited in support of the proposition that a foreign corporation engaged under Federal contract need not qualify.

There is also the case of *Pembina Consolidated Silver Mining & Milling Company v. Pennsylvania,* (125 U. S. 181), in which the Supreme Court said that, "The only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or when its business is strictly commerce, interstate or foreign."

In June, 1932, the Attorney General of Oregon, rendered an opinion to the effect that a corporation under such circumstances was not an instrumentality of the Federal government, but an independent contractor, and consequently should qualify to transact its business in the state. In the course of the opinion the case of *Baltimore Shipbuilding & Dry Dock Company v. Baltimore,* (195 U. S. 375), is referred to as authority for the statement that it is, "extravagant to say that an independent private corporation for gain, created by a state, is exempt from state taxation, either in its corporate person or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time." Referred to also are the cases of *Fidelity & Deposit Co. v. Pennsylvania,* (240 U. S. 319) and *Metcalf & Eddy v. Mitchell,* (269 U. S. 514).

The decisions cited, both for and against the proposition of qualification, might well be considered when this question arises, since the principles laid down will aid materially in making a determination as to whether or not compliance with the foreign corporation statute of a particular state is necessary.

Domestic Corporations

California.

Right of corporation to become possessed of new powers by amendment of its articles. The fact that California's new General Corporation Law (1931) was not under consideration in this case is of no moment. Action by a minority stockholder against his corporation for dissolution and an accounting by its president and controlling director, in which there was a cross complaint by one of the defendant stockholders. On appeal by the cross complainant from an adverse judgment below, the California District Court of Appeal, First District, Division 2, affirms. To the contention that the corporation was engaged in activities beyond its powers the court answers: "The original articles adopted are attached to the cross-complaint, but it is not alleged that they have not been amended. The presumption that respondents are acting in good faith prevails over the innuendo to the contrary, in the absence of any allegations of facts." The court feels that it may fairly assume that appropriate amendments have been made because of the "vigorous argument" that the provision of the Civil Code (Section 362) permitting such amendments is unconstitutional; and says: "To this latter argument there is but one reply—Article 12, Section 1, of the state Constitution authorizes the Legislature to prescribe the powers, rights, and duties of corporations and to amend or repeal regulations to that effect. Hence the 'contract' of the stockholders was taken in contemplation of the right of the corporation to change or increase its purposes by amendment of its articles under Section 362." *Loney v. Consolidated Water Co. of Pomona et al.*, 9 P. (2d) 888. J. E. Stillwell, of South Pasadena, and Robert E. Austin and John N. Helmick, both of Los Angeles, for appellant. Kemper Campbell and Charles L. Nichols, both of Los Angeles, for respondents.

Separate entities of corporation and the owner of all the stock thereof. To the merits here we do not go. The District Court of Appeal, Second District, Division 1, California, says: "Notwithstanding such authorities (there cited), it should be observed that it does not necessarily follow that because all the capital stock of a corporation is owned by one individual, every act of the corporation may be directly charged to the owner, nor every act of the owner be likewise charged to the corporation. The entity of the corporation is wholly separate and distinct from the owner of its capital stock; and ordinarily, the liability of each is separate and distinct from the other. It is only when an injustice will result from some conduct of either, which is connected, intermingled, and interwoven with the particular business or act in question, that equity will interfere with the operation of the legal fiction by and

through which the personality of the corporation is legally recognized. In such a situation, the only point at issue is the establishment of the fact that in the performance of the act in question, either the corporation or its owner, as the case may be, has assumed the individuality of the other, and in so doing has caused an injustice to result to some person who has dealt with it or him upon the faith of appearances, if not of actual representation of facts, which are either contrary to or inconsistent with the result or the effect of the main act under consideration." *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Inc.*, 12 P. (2d) 145. Appearances: Meserve, Mumper, Hughes & Robertson, and, Walter H. Hewicker, all of Los Angeles.

Florida.

Action by minority stockholders against corporation and its officers, for misconduct, malfeasance, etc., their remedies within the corporation not having been exhausted, will not lie. The United States Circuit Court of Appeals, Fifth Circuit, affirms, here, the decree of the court below dismissing the bill brought as suggested by the caption. The court says: "A stockholder, in taking stock in the ordinary corporation, submits, within the charter limits, to a guidance of the corporate affairs according to the will of the owners of a majority of the stock and through the directors whom the majority choose. The minority have a right to have the majority exercise their judgment, and to exercise it honestly and not fraudulently, but have no right to have a court substitute their own ideas and wishes for those of the majority, and that in advance of any refusal of the majority to hear and decide on the matter at issue. Minority stockholders may not in the absence of sudden emergency ask a court of equity to interfere in the management of their corporation until they have earnestly and unsuccessfully sought redress from the Board of Directors, and when appropriate also from the stockholders in meeting, unless they can show sufficient reasons for not doing so." *Stone et al. Holly Hill Fruit Products, Inc., et al.*, 56 F. (2d) 553. Robert R. Milam, of Jacksonville, for appellants. A. G. Turner, of Tampa, R. B. Huffaker and M. H. Edwards, both of Bartow, and Ellis F. Davis, of Kissimmee, for appellees.

Minnesota.

Nonassessable stock issued under authority of Securities Commission is nevertheless subject to the double liability attaching to such stock; on the full faith and credit clause. Action, in Oregon, by receiver of a Minnesota corporation to recover a 50% assessment against one of the stockholders thereof, under the former constitutional provision relative thereto. The order of assessment by a Minnesota district court was affirmed by the Supreme Court of Minnesota. The lower court, here, found for defendant. The old constitutional provision exempted from the so-called double liability

the stockholders of corporations carrying on any kind of manufacturing or mechanical business. The stock here in question, issued by authority of the Securities Commission was "fully paid and nonassessable." It was urged that this authorization was conclusive of the question and precluded the making of the assessment. It is held by the Supreme Court of Oregon, reversing, that whereas a corporation and its stockholders may covenant, as between themselves that stock shall be nonassessable, such agreement is without force as against creditors; it was further held that "it was incumbent upon the lower court, under the full faith and credit clause of the Constitution, to give full force and effect to the decree of the Minnesota court holding that the corporation did not come within the excepted class and, therefore, its stockholders are subject to double liability." *Cox v. Updegraff*, 12 P. (2d) 1025. Rehearing denied, September 14, 1932. Bartlett Cole, of Portland, for appellant. James G. Wilson, of Portland (Wilson & Reilly, of Portland, on the brief), for respondent.

Missouri.

Recovery by dissenting minority stockholder of market value of his shares of stock on sale by corporation of all of its assets. Action by a dissenting stockholder for the market value of his shares of stock, the corporation, under the supposed authority of an act of the legislature of 1927 (Laws of 1927, p. 386—being Sections 4567 and 4568, Revised Statutes of 1929), having sold all of its assets and "thereby disabling itself from the further prosecution of the business for which it was incorporated." At the time of the passage of the act referred to the corporation was in active and successful operation of its business. Demurrer to the petition, on the ground of failure to comply with a provision of the aforementioned law authorizing application to a circuit court by a dissenting stockholder within sixty days after the stockholders meeting at which the sale was agreed to, was sustained below. The Supreme Court of Missouri, Division No. 1, reversing and remanding, says that this latter provision "does not purport to place a limitation on the time in which actions such as this may be brought" but "merely limits the times within which certain things must be done in order to conform to the special proceedings for which it provides." But the court says further: "If the act changes or alters in any respect the rights arising from the implied contract between a corporation and its stockholders, or between the stockholders inter sese, as they have heretofore existed, it must under well known rules of construction, be held to be prospective only in its operation. If, therefore, it was intended to effect a change in the contract rights just mentioned, it is without application to those existing at the time it became effective as a law." *Hicks v. Forsyth Electric & Water Co.*, 50 S. W. (2d) 1045. Sharp & Blunk, of Forsyth, for appellant. Chas. H. Groom and Gideon & Ingenthron, all of Forsyth, for respondents.

New Jersey.

Individual liability of those who contemplate the organization of a corporation on a contract then entered into in the name of such contemplated corporation. Action against certain individuals who contemplated the organization of a corporation, and who after perfecting their plans did so, but, because of conflict, with another name than that originally chosen, on a contract entered into by the purported corporation under the name first selected before any statutory step had been taken in the direction of incorporation. This, after judgment, from which nothing was realized, of course, had been obtained against the nonexistent corporation of the first name. Judgment against the individual defendants is affirmed by the Supreme Court of New Jersey. The court says: "There is abundance of authority holding that a contract with an imperfectly organized corporation cannot be made the basis of holding the individual incorporators liable. There is also authority that if proceedings to judgment are effected against the corporation the individual incorporators are not liable. All such nonliability, however, is predicated upon the fact that there is a de facto corporation, and that the defendants are the incorporators or stockholders. Such is not the case here. * * * It was not, therefore, an imperfectly organized corporation; it was not a corporation of any kind; there were no incorporators; no stockholders." A suit against the supposed corporation does not estop plaintiff, so states the court, from proceeding against the parties who led it to believe that a corporation actually existed. *Federal Advertising Corporation v. Hundertmark et al.*, 160 A. 40. R. H. Cunningham, of Paterson, for appellant. Richenaker & Ford and W. Henig, of Hackensack, for respondent.

New Mexico.

Preferred stock dividends may not be authorized to be paid regardless of earning of a net profit or of existence of a surplus. Originally, the holders of preferred stock of the corporation here involved were entitled to noncumulative 8% dividends. By amendment to the certificate of incorporation an attempt was made to give them the right to 8% dividends each year, regardless of the existence of a surplus or net profits arising from the corporation's business, and to make them creditors of the corporation with respect to such dividends. Action by an owner of common stock in the corporation to obtain an adjudication of the validity of the attempted charter amendment changing the status of the preferred shareholders. Reversing the court below the Supreme Court of New Mexico sustains "appellant's main contention"—beyond which we do not go, here. The court says "The attempt to authorize dividends from capital is void. It is prohibited to the corporation itself. It is against declared public policy. It cannot be accomplished by any authorization, any ratification, or any estoppel." *Cartwright v. Albuquerque Hotel Co., Inc., et al.*, 11 P. (2d) 261. Summers Burkhart, of Albuquerque, for

appellant Cartwright. M. C. Mechem and George S. Downer, both of Albuquerque, for appellants Albuquerque Hotel Co. and George Roslington. Marron & Wood, of Albuquerque, for appellees.

Courts may enjoin use of corporate name even though such has been determined to be acceptable by state. The Standard Oil Company of California, a Utah corporation authorized to do and doing business in New Mexico, was granted a decree in a United States District Court enjoining a New Mexico corporation, organized some eighteen months after the former had been licensed to do business in the state, from using, in New Mexico, the corporate name The Standard Oil Company of New Mexico, Inc. The United States Circuit Court of Appeals, Tenth Circuit, affirms. The New Mexico corporation law provides that "No name shall be assumed already in use by another existing corporation in this state, or which in the judgment of the State Corporation Commission, is so nearly similar thereto as to be misleading or confusing." It was urged that as the Commission had granted the charter, it must have considered the question of the availability of the chosen name, and that its decision is final and conclusive. The court answers that "the statute does not undertake to make it so. The authorities generally hold that such a decision is not conclusive on the courts." To the contention that the mere adoption of a similar name, there having as yet been no engaging in business thereunder, does not constitute unfair competition warranting injunctive relief, the court answers: "This is not strictly a suit to enjoin unfair competition. It is in the nature of a bill *quia timet* to enjoin the threatened unlawful use of a corporate name. * * * Equity aids the vigilant, not those who slumber on their rights. * * * It was the duty of plaintiff to act before the rights of innocent third persons (such, for example as purchasers of stock in defendant) had intervened. * * * Furthermore, since defendant has not commenced the transaction of business, it will be a simple matter for it to change its corporate name, * * *. A court of equity will act by injunction to prevent a threatened wrongful act which appears to be imminent, if irreparable injury will result therefrom. * * * Neither reason nor authority requires plaintiff to wait until the threatened injury has occurred." *The Standard Oil Company of New Mexico, Inc., appellant, v. Standard Oil Company of California, appellee,* 52 F. (2d) 973. F. A. Catron, of Santa Fe for appellant. E. R. Wright, of Santa Fe (Miley, Hoffman, Williams & France, of Oklahoma City, Okl. and D. N. Hoover, of Santa Fe, on the brief), for appellee.

New York.

On the fungible nature of shares of stock of a particular corporation. Plaintiff delivered to her brokers a certificate, assigned in blank, for 70 shares a corporation's stock, to be sold when directed, her purpose being "to place the stock near the market where quick delivery of the shares could be made." In order to do their full

share in carrying out the wishes and intent of their customer the brokers placed the shares in street names. No order to sell followed. On request for a return "of her stock" a certificate, but not the same certificate they had received from her, was sent to her by the brokers. She retained the certificate. Dividends paid during the period the brokers held the stock were turned over to her. She sues for the difference in value of the shares at the time the brokers put the stock in street names, and the lower value at the time the different certificate was delivered to her. It was shown that the brokers had at all times in their possession or under their control 70 shares of the particular company's stock and were ready, able and willing to deliver such to the customer. There was no pledging and no real "disposing of" the certificate, and no conversion of plaintiff's property. The brokers profited nothing; plaintiff lost nothing because of any act of the defendants. Her loss, if any, was due to the depreciated market value of her interest in the corporation. Judgment for defendants, dismissing plaintiff's claim. (New York Supreme Court, Appellate Division, Third Department.) *Clemenshaw v. Meehan et al.*, 258 N. Y. Sup. 225. Michael D. Nolan, of Troy, for plaintiff. Phillips, Mahoney, Leibell & Fielding, of New York City (Neile F. Towner, of Albany, of counsel), for defendants.

Increase of capital stock of New York corporation may not be effected without prior notice to all stockholders of such contemplated action. Here it is alleged that under a collateral agreement plaintiff's interest in a corporation about to be organized by the parties to the agreement was at all times to be a 30% interest; that, the corporation was organized, plaintiff acquiring 150 of the 500 shares authorized; that, subsequently, without his knowledge or consent the authorized capital was doubled and 500 additional shares issued to the other parties to the contract thus reducing his interest percentage from 30% to 15%. The court below dismissed the complaint, being prompted thereunto largely, if not entirely, because of plaintiff's failure to allege that he was deprived of an opportunity to subscribe for the new stock in proportion to his original holdings. The New York Supreme Court, Appellate Division, First Department, reverses, and after referring to and quoting from certain sections of the Stock Corporation Law relative to increases of capital stock, notice to stockholders of meetings to be held to vote on proposals such as such increases, etc., says: "There is no requirement in the statute that the plaintiff must assert his preemptive right to subscribe for the increased stock. The statutes are mandatory, and there may be no increase in the capital set-up of a corporation, except upon due notice to all the stockholders." "Facts were set forth sufficient to constitute a cause of action." *Danzig v. Lacks*, 256 N. Y. Sup. 769. Edmund L. Mooney, of New York City (Nathaniel H. Kugelmass, of New York City, of counsel; Wilbur W. Chambers, of New York City, on the brief), for appellant. I. Gainsburg, of New York City (Joseph P. Segal, of New York City, of counsel), for respondents.

DELAWARE CORPORATIONS . . . . . .

The machinery of The Corporation Trust Company for handling Delaware corporation business for lawyers is so complete as to evoke surprised admiration from Delaware visitors, yet it is but an example of the extent to which this company goes in all departments of its business to give the utmost in service to attorneys . . . Just across the Green from the state capitol is The Corporation Trust Company's Dover office, so placed that the quickest possible contact may be made with the Secretary of State's office in handling business for lawyers — putting papers on file, procuring certified copies, getting official information. Then at Wilmington are the company's main Delaware offices, so located in order that the metropolitan railroad and mail services of Wilmington may be obtained — the company's own fast motor cars connecting Wilmington with Dover in practically an hour's time, thus saving for its attorney-clients several hours of delay over any other possible arrangement of offices, and in many cases, a whole day. There are no other such facilities in Delaware for the lawyer's convenience.

The Dover office— occupying a converted Colonial mansion.

Wilmington office— one of the

WHEN YOU WANT FOR YOUR CLIENTS—

Power to hold real and personal property without limit as to amount; no stockholders' for stock, either par or no par; power to

Power to hold real and personal property without limit as to amount; no stockholders' for stock, either par or no par; power to provide for the issuance of any number of classes of stock and for the issuance of preferred stock in series as needed, with power of the board of directors to fix dividend rates on each separate series in accordance with investment conditions at the time of issue; power to retire preferred stock by directors without the necessity of calling a stockholders' meeting; power to provide that less than a majority of directors shall constitute a quorum; power to provide for alternate directors; power to have the board of directors fill vacancies in their membership when less than a quorum remains; power to provide for different classes of directors; power to create voting trusts; power to hold directors' and stockholders' meetings within or without the state—

When you want modern advantages like any of the above for your clients, based upon a sound, seasoned, tested corporation law of many years' standing, and a simple, equitable system of taxation, consider Delaware for incorporation. To consider Delaware properly, study our pamphlet, "Delaware Corporations"—free to lawyers.

Wilmington office—one of the

Wilmington office—one of many aisles of steel files for corporation records.

Wilmington office—a section of the Corporation-Records Entry Department

Ohio.

Proxies given by stockholders of record on properly fixed date prior to meeting may be voted at the meeting though at the time of the meeting the proxy givers are no longer stockholders, their shares having been sold. In the February, 1931, Journal appeared a digest of the decision of the Ohio Court of Common Pleas (Youngstown) granting, as prayed by plaintiffs, stockholders of Youngstown Sheet and Tube Co., a permanent injunction restraining the company from selling, under an agreement proposed by its board of directors and ostensibly assented to by the proper number of shareholder votes, all of its assets and good will to the Bethlehem Steel Corporation. It was found by the court that some of the directors present at the directors meeting and voting affirmatively had had no opportunity to sufficiently inform themselves on the matter before the board, or, having had opportunity had not availed themselves thereof; that one director who voted "no" frankly stated that he did so because he was without sufficient knowledge; and that another abstained from voting since he was not fully informed; and it was held that under such circumstances the attempted action of the board was without effect and that "a later authorization by the stockholders, even by unanimous vote, would be void also." Appeal was taken to the Ohio Court of Appeals, Mahoning County. When this came on for hearing plaintiffs moved to dismiss the appeal, and defendants moved to dismiss the case, on the ground that the matter was moot since the agreement to merge had been canceled and abandoned. The court says that the question is moot but to grant plaintiffs' motion would leave standing the judgment below, whereas to grant defendants' motion would deprive plaintiffs of their right to present to the court their ancillary issue of the right to recover attorneys fees and other costs. So the two motions were held in abeyance pending a consideration of the plaintiffs' right to recover attorneys fees and other costs (in effect, of the validity of the board's resolution and the stockholders' assent or confirmation). The court says that the statutes (Sec. 8623-72) provide an exclusive remedy for minority stockholders in such a situation as is here presented (to receive fair value for their shares—if the provisions of the statute are complied with) and that "the only grounds upon which the minority stockholders can maintain an action are that the proceedings are ultra vires, illegal or fraudulent. As there is no claim that the contract now before the court was either ultra vires or illegal, except as hereinafter noted, the only right to maintain this action is on the ground of fraud." No fraud is found, and the actions of the board and the stockholders are in all respects upheld, and so, the defendants' motion to dismiss is sustained. In considering the validity of the vote of the stockholders and in deciding as indicated in the caption to this digest the court states: "It is further urged that such a construction of this section (Sec. 8623-47—providing for fixing record date for determination of a stockholder's right to receive notice of meeting, right to vote thereat, etc., and

closing of books against transfers in interim) would permit persons to vote at an election when at that time they were not stockholders or interested in the corporation and that such a construction would be in violation of constitutional rights, Article 13, Section 2. We think not. The section gives the legislature power to enact laws regulating and governing the conduct and actions of corporations organized under the laws of this state. Under Section 8623-47 record holders of stock on the record date were possessed of two rights in the corporation, one the owner of stock and the other the right to vote. He could sell one and retain the other, or sell both. If the purchaser of this stock wished to control the right to vote on the (date of the called meeting), all he had to do was to include in his purchase that right and secure a proxy withdrawing the one already given and granting the purchaser the right to use the proxy. This principle was recognized in *Thompson v. Blaisdell*, 107 Atl. 405." *Francis T. Wick, et al., v. The Youngstown Sheet & Tube Co., et al.*, Commerce Clearing House Court Decisions Reporting Service, Requisition No. 72537. Harrington, DeFord, Huxley & Smith, of Youngstown, Day & Day and Squire, Sanders & Dempsey, all of Cleveland, and Park Chamberlain, of New York City, for plaintiffs. Kennedy, Manchester, Ford, Bennett & Powers, of Youngstown, Cravath, DeGersdorff, Swain & Wood, of New York City, and Baker, Hostetler & Dislo, of Cleveland, for defendants.

Texas.

Corporation having acquired land when in good standing may sue for alleged trespass when it was in default for non-payment of taxes whether or not payment of back taxes, penalties, etc., revives its forfeited right to do business. Such is the caption to a digest of the decision of the Texas Commission of Appeals in this case, 35 S. W. (2d) 111, appearing in The Corporation Journal for April, 1931, at page 370 (see May, 1931, Journal at page 392). Appellant's motion for rehearing was granted. Questions were certified by the Court of Civil Appeals, which the Commission answers, the opinion being adopted as the opinion of the Texas Supreme Court, the former opinion being withdrawn. The holding now is that a corporation whose charter has been forfeited for failure to pay its franchise taxes may *not* sue in any event so long as such condition persists but, if after having been in default, for any period of time, a corporation pays all of its franchise taxes due the state, together with accumulated penalties and interest, and receives a proper certificate of revival from the Secretary of State (who may, regardless of the period of default, at any time accept such payments and issue such certificate of revival), it is privileged to bring such a suit as the present involving alleged trespass (when in default) on land acquired by it previously when in good standing. *Federal Crude Oil Co. v. Yount-Lee Oil Co., et al.*, 52 S. W. (2d) 56. Nelson Phillips, of Dallas, and W. D. Gordon, E. E. Easterling, and M. S. Duffie, all of Beaumont, for appellant. F. A. Williams, of Galveston, Beeman

Strong, Orgain, Carroll & Bell and Ewell Strong, Jr., all of Beaumont, and R. L. Batts, of Austin, for appellees.

Foreign Corporations

Arkansas.

A local transaction collateral to an interstate transaction does not constitute "doing business" in the local jurisdiction by an unqualified foreign corporation. The activity here engaged in, in Arkansas, by a foreign corporation, not licensed to do business in that State, was the execution of a renewal guaranty contract which, so says the Supreme Court of Arkansas, in affirming the judgment below for plaintiff, "was a mere incident to the original contract for the extension of a line of credit made and to be performed in Missouri," and was "clearly collateral to and not independent of the indebtedness incurred in the line of credit." Continuing the court states, referring to Corpus Juris, 14A, Sec. 3982: "Transactions merely incidental or collateral to contracts made and to be performed outside the state do not constitute a doing of business within the meaning of statutes imposing conditions, restrictions, or regulations of the right of foreign corporations to do business. This general declaration of law was approved by this court in the case of *Equitable Credit Co. v. Rogers*, 175 Ark. 205, 299 S. W. 747." *McHaney v. Lafayette South Side Bank & Trust Co., Inc.*, 50 S. W. (2d) 991. Partlow & Rhine and W. W. Bandy, all of Paragould, for appellants, Cecil Shane, of Blytheville, for appellee.

General.

What constitutes "a regular and established place of business" of a foreign corporation? This is a patent infringement case brought in a California Federal court against a corporation foreign to California having a San Francisco representative. To give the court jurisdiction it was necessary under Section 48 of the Federal Judicial Code (28 USCA Sec. 109) that the defendant corporation had within the district "a regular and established place of business." Such was not shown to be the case to the satisfaction of the District Court, which dismissed the action for want of jurisdiction. The United States Circuit Court of Appeals, Ninth Circuit, affirms. The purpose of this paragraph is to call attention to the report of the case as being a helpful discussion of the general subject matter of jurisdiction in such cases, there being citations to many decisions. *Wilson v. McKinney Mfg. Co.*, 59 F. (2d) 332. Chas. E. Townsend, Wm. A. Loftus and Thos. G. Goulden, all of San Francisco, for appellant. C. S. Evans and H. N. Orr, of San Francisco, for appellee.

Equity relief to stockholder in court in state other than that of his corporation's domicile. Suit in equity by a citizen of Illinois, a stockholder in a Delaware corporation, in a United States District Court

(Illinois) against the corporation and an allied Delaware corporation each qualified to do, and doing, business in Illinois. Various restraining orders were sought; the appointment of a receiver was asked. The District Court found "that said bill of complaint relates to the internal affairs and management of the defendant foreign corporations, and the court therefore declines to exercise jurisdiction of the subject matter," and so, dismissed the bill. The Circuit Court of Appeals, Seventh Circuit, reverses and remands. (Numerous cases lending support to the District Court's dismissal are cited, discussed, and differentiated; contra, many cases supporting the principle enunciated by the Circuit Court, as quoted below, are cited: hence this digest.) The court says: "Thus it is quite apparent, aside from the question of jurisdiction, which in the instant case is admitted, the question as to whether the trial court should exercise jurisdiction is one of policy and expediency, regardless of whether or not the acts complained of involve the internal affairs and management of the corporation. In such instances courts are not warranted in declining to exercise jurisdiction merely because the act complained of involves internal affairs and management of the corporation; but it must further appear that to do so would be inexpedient or contrary to the policy of the law. Inexpediency may well be based upon comity, legal restrictions, lack of equity on the part of plaintiff, or lack of power on the part of the court to render or enforce an equitable decree for want of jurisdiction of property or parties; but, unless some such basis is apparent, we can see no reason why the court should decline to exercise jurisdiction which it admittedly has." *Williamson v. Missouri-Kansas Pipe Line Co.*, 56 F. (2d) 503. Theodore E. Rein, of Chicago, Illinois, for appellant.

Kentucky.

Service of summons on agent of subsidiary is not valid service on foreign parent corporation. Here, a corporation foreign to Kentucky, had an office in that state which office was in charge of a vice-president and at which was located an assistant secretary; it had an agent for the service of process duly designated in the office of the Secretary of State, as required by the law applying to foreign corporations. Service was on an employee of a subsidiary corporation controlled by defendant-appellant. Default judgment for plaintiff was taken. The Court of Appeals of Kentucky reverses, with directions to set aside the default judgment and to hear the evidence, previously presented after the default judgment has been entered, as a defense to the action for damages. The court says that the service was bad. "The appellant had its own officers and agents, in the state, amenable to the service of summons, and it cannot be brought into court by the service of summons upon the agent of another corporation simply because the latter was a subsidiary or controlled company." *Missouri-Kansas Pipe Line Co. v. Hobgood*, 51 S. W. (2d) 920. Cary, Miller & Kirk, of Owensboro, for appellant. J. T. Gooch, of Madisonville, for appellee.

New York.

A foreign corporation having in New York, without more, an office from which salesmen are directed, merely, has no "principal place of business" in the state for purposes of the Lien Law. The question to be decided here: Was the notice of lien filed by a foreign corporation valid or invalid? The foreign corporation was not licensed to do business in New York; salesmen operated in the state, all orders being sent to the home office for acceptance or rejection —there is no question but that the company was not engaged otherwise than in interstate commerce in New York; a sales office was maintained, and had been for a long term of years, in New York City, from which the New York salesmen operated; otherwise it had no office or place of business within the state. The Lien Law requires that a foreign corporation shall state in the notice of lien "its principal place of business within the state." In the present notice, no place of business in New York was stated, its principal office and place of business being noted as at a local address in Philadelphia. It was held, below, that the failure to state the address of the New York City sales office as being that of "its principal place of business within the state" was a fatal defect. The New York Supreme Court, Appellate Division, Third Department, reverses, holding the notice of lien valid. Reasoning: In effect—if a foreign corporation is not "doing business" in New York within the purview of the Stock Corporation Law (General Corporation Law and Tax Law), it has no place of business there and so has no "principal place of business within the state." "Acts not amounting to the transaction of business within the state under the Stock Corporation Law should be given the same effect and classification under the Lien Law." "The direction and management of salesmen covering a limited area is not the general business of the corporation, and the office from which the salesmen are directed is not a principal office of business. There being no principal place of business within the state, the recital of the principal place outside the state was a sufficient compliance with the provisions of the Lien Law." *Butts v. Valerio Construction Co. et al.*, impleaded with Hercules Cement Corporation, appellant, 159 N. Y. Sup. 93. Hun, Parker & Reilly (Michael D. Reilly and Earle W. Lawrence, of counsel), all of Albany, for appellant.

Holder in due course of paper discounted by it for unlicensed foreign corporation doing business in the state may sue thereon. An unlicensed foreign corporation, held by the jury to have been doing business in New York, after a bill of exchange had been unconditionally accepted by a resident of New York, discounted the trade acceptance at its bank. The bank is now suing on the paper. As a defense the provisions of Section 110 of the Stock Corporation Law (as it read prior to amendment in 1927) were invoked, namely, that neither a foreign corporation, doing business in New York, but unlicensed, nor its assignee, may maintain an action in the New York courts on a contract made by the corporation in the State. (The

subject matter of the old Section 110 is now embodied in Section 218 of the General Corporation Law—the material change being, that for the word "assignee" the words "successors in title" are used.) The lower court, setting aside the verdict of no cause of action and ordering a new trial, held that whether or not the unlicensed company was doing business in New York the section in question is not available as a defense since Section 96 of the Negotiable Instruments Act, giving to a holder in due course of an instrument the right to enforce payment regardless of defects of title of prior parties or of defenses available to prior parties among themselves, must prevail. The Supreme Court, Appellate Division, Third Department, affirms the order below setting aside the verdict, and (because of stipulations) renders judgment for the plaintiff. The court says that plaintiff (the discounting bank) is a holder in due course, not an assignee of the bill of exchange within the ordinary meaning of "assignee," that Sections 110 and 218, supra, are not necessarily in conflict, and that "had the legislature intended by these sections to declare an exception to the rule in section 96 (of the Negotiable Instruments Act) it should and would have so stated." *Alliston Hill Trust Co. v. Sarandrea,* 258 N. Y. Sup. 299. Barnell & Fazio, of Syracuse (R. D. Woolsey, of Canastota, of counsel), for appellant, John L. Robertson, of Canastota, for respondent.

Wyoming.

Convenience of plaintiff not to be considered in determining whether or not foreign corporation may be sued in local courts. Action by an individual, a resident of Wyoming, against a Massachusetts corporation, not domesticated in Wyoming, whose doing of business in the state consisted at most of solicitation of trade merely, for whom no agent for service of process had been named, service having been made on its president while in the state on isolated visit at request of a co-operative marketing association. Motion to quash and set aside the service is granted by the United States District Court, District of Wyoming, to which the cause had been removed from a state court, for that the process was not properly served—the president not being a "managing agent in the state" as he would have to be to validate service on him—, but particularly since the Massachusetts corporation was not "doing business" in Wyoming. The court says: "It is suggested that the plaintiff would be submitted to some degree of hardship if he were relegated to prosecuting his suit in the jurisdiction where the defendant is domiciled, but, of course, this circumstance cannot be considered in determining the rights of the parties as they appear from the record before the court; but, in addition, so far as the record here shows, the plaintiff may be as well able to prosecute his suit in the courts of Massachusetts as the defendant is to defend the suit in the courts of Wyoming." *Minty v. Draper & Co., Inc.,* 57 F. (2d) 551. Durham & Bacheller, of Casper, for plaintiff. Marion A. Kline, of Cheyenne, for defendant.

Taxation

Iowa.

Preparing, by mixing, a paving material and then laying the same as a permanent pavement, is not "manufacturing." The Iowa construction company, here, mixes in portable machinery certain ingredients in proper proportions, deposits or lays this mixture, and then treats it, whereupon a finished hardened pavement results—under paving contracts. Under Iowa law manufacturing companies enjoy a certain exemption from taxation. The trial court held that the company is a manufacturer, within the meaning of the law, and was entitled to be assessed as such. The Supreme Court of Iowa reverses, saying: "It is apparent from the stipulation that the appellee does not make a product and sell it to some other party who in turn uses it to make a pavement. It not only 'combines' the several ingredients, but it uses the combination itself in making the finished product which becomes a permanent part of the realty. It furnishes all the material and does all the work of laying permanent paving. * * * We think the legislative intent was to exempt from taxation manufacturers who are engaged in manufacturing personal property for sale, and not builders or 'contractors' who are engaged in erecting permanent structures, such as paving, which become a permanent part of the real estate." *In re Koss Const. Co.*, 241 N. W. 495. George P. Comfort, Chauncey A. Weaver, and C. R. S. Anderson, all of Des Moines, for appellant. Stipp, Perry, Bannister & Starzinger, of Des Moines, for appellee.

Tennessee.

General state income tax held unconstitutional. Chapter 21 of the Tennessee Public Acts of the 2d Extra Session of 1931 sought to impose a general income tax on individuals and corporations. The Supreme Court of Tennessee, affirming the decree below holding the taxing act to be unconstitutional, says that as the State Constitution (Art. 2, Sec. 28) specifically authorizes the Legislature to levy a tax on incomes derived from stocks and bonds that are not taxed ad valorem, it is without power to tax incomes from other sources, regardless of the other powers of taxation given to it by the Constitution, namely, the power to tax all property, uniformly and equally, and the power to tax privileges in such manner as it may from time to time direct. *Evans et al. vs. McCabe, Commissioner of Finance, etc.*, 52 S. W. (2d) 159. John R. Aust and Charles L. Cornelius, both of Nashville, for plaintiffs. L. D. Smith, Roy H. Beeler, and Myles P. O'Connor, all of Nashville, for defendant.

CORPORATE MEETINGS HELD

During the past few weeks meetings of the corporations named below, among many others, have been held at some one of the offices of The Corporation Trust Company.

United Milk Products Corp.
Carleton & Hovey Company
American Corporation
The Atlas Lumnite Cement Co.
Alexander Hamilton Institute
The Carpenter Steel Company
Western Pacific Railroad Corp.
Midvale Steel & Ordnance Co.
Atwater Kent Company
Hupp Motor Car Corporation
American Hide and Leather Co.
National Distributors Corp.
United American Utilities, Inc.
So. Pac. R. R. Co. of Mexico
B. F. Schlesinger & Sons, Incorporated
Transcontinental & Western Air, Inc.

Some Important Matters for November and December

This calendar does not purport to cover general taxes or reports to other than state officials, or those we have been officially advised are not required to be filed. *The State Report and Tax Service* maintained by *The Corporation Trust Company System* sends timely notice to attorneys for subscribing corporations of report and tax matters requiring attention from time to time, furnishing information regarding forms, practices and rulings.

ALASKA—Annual Corporation Tax due on or before January 1.—Domestic and Foreign Corporations.

DELAWARE—Annual Report due on or before first Tuesday in January.—Domestic Corporations.

DISTRICT OF COLUMBIA—Annual Report due between January 1 and January 20.—Domestic Corporations.

GEORGIA—Annual License Tax Report due on or before January 1.—Domestic and Foreign Corporations.

NEW YORK—Annual Franchise Tax on Business Corporations due on or before January 1.—Domestic and Foreign Business Corporations other than realty and holding companies.

Supplementary Franchise Tax Return due on or before November 30.—Domestic and Foreign Corporations organized or qualified between June 30 and November 1 of current year.

UNITED STATES—Fourth Installment of Income Tax imposed for the calendar year 1931 due on or before December 15.—Domestic corporations and foreign corporations having an office or place of business in the United States.

The Corporation Trust Company's Supplementary Literature

In connection with the various departments of its business The Corporation Trust Company publishes the following supplementary pamphlets and forms, any of which it is always glad to send without charge to readers of The Journal:

Amateur Corporate Representation. A booklet dealing with some of the weaknesses of placing a company's statutory representation in the hands of business employes or others not trained in the matters involved.

Delaware Corporations. Presents in convenient form a digest of the Delaware corporation law, its advantages for business corporations, the attractive provisions for non par value stock, and a brief summary of the statutory requirements, procedure and costs of incorporation, completely revised to reflect the changes made by the amendments of 1931.

Incorporation in Canada Under the Dominion Act. Explains the procedure for incorporation of Canadian companies, the requirements, taxes, maintenance of office, etc., and all the special features of the Dominion Companies Act. Attorneys with a client who may, because of tariff barriers, be considering the organization of a Canadian company to conduct the company's Canadian or export business, will find this pamphlet extremely useful.

When Corporations Cross the Line. A simple explanation of the reasons for and purposes of the foreign corporation laws of the various states, and illustrations of when and how a corporation makes itself amenable to them. Of interest both to attorneys and to corporation officials.

What Constitutes Doing Business. (Revised to April, 1930.) A 208-page book containing brief digests of decisions selected from those in the various states as indicating what is construed in each state as "doing business." The digests are arranged by state, but a Table of Cases and a Topical Index make them accessible also by either case name or topic.

Questionnaire on Business Outside State of Organization. This is a form for attorney's use in determining when a corporation should be qualified. The questions are those which will usually bring out the points necessary to be considered.

Why a Transfer Agent? The question of why corporations, even those of small capitalization or with inactive or closely held stock, are safer when their stock records are in the hands of an experienced transfer agent is answered in this pamphlet by actual incidents from the experiences of different corporations.

Why Corporations Leave Home. This is an informal discussion, from the business man's point of view and in layman's language, of why so many business companies are organized under the laws of Delaware instead of in their home states. While primarily for laymen, lawyers also find this pamphlet useful when considering the matter of what state to choose for incorporation of a client's business.

Transfer Requirements Chart. This supplement to The Stock Transfer Guide and Service shows the classifications into which requests for stock transfer are divided and how the principal requirements for each classification may be determined, either by the transfer agent or the individual desiring transfer made.